EXHIBIT 5

Corporate Securities Series

NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS

Volume 1

Lou R. Kling
Member of the New York Bar

Eileen T. Nugent
Member of the New York Bar

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A forward subsidiary merger is a simple variation on the direct merger. Rather than merging into P as in a direct merger, T merges into S, a wholly owned subsidiary of P.[20] S succeeds to all of T's assets and liabilities, T goes out of existence and the T stock formerly held by T's shareholders is converted into the acquisition purchase price (cash, securities or other property)—the same consideration which the T shareholders would have obtained pursuant to a merger of T directly into P. the only structural difference between a direct and a forward subsidiary merger (although an important one) is that, following consummation, the assets and, particularly, the liabilities of T have been assumed by a subsidiary of P, not P itself.

If a forward subsidiary merger is similar at the corporate level to an asset acquisition by P's subsidiary S, and at the shareholder level to a stock sale, a reverse subsidiary merger is similar in end result, from both the corporate and shareholder viewpoints, to a stock purchase of T by P. In a reverse subsidiary merger, S merges into T (S, rather than T, ceasing to exist) and T succeeds to all of S's assets and liabilities. If, as is often the case, S were a newly created shell corporation with no assets or liabilities, T, post-merger, would be the same entity, practically as well as legally, as T, pre-merger. Pursuant to the merger, the outstanding shares of common stock of S would be converted[21] into shares of common stock of T and, as a result, T would become a (wholly owned) subsidiary of P. The T stock held by the former shareholders of T is converted, by operation of the merger, into the acquisition consideration. The effect is the same as a purchase by P of all of the outstanding stock of T from its shareholders.

[5]—Binding Share Exchanges

A relatively recent acquisition method under some corporate statutes is the "binding share exchange." While not recognized in Delaware and many other jurisdictions, this form of acquisition is permitted in a growing number of states including New York.[22] The binding share exchange combines the advantages of a stock purchase with a reverse subsidiary merger. Pursuant to a plan of exchange, all

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[20] Generally S (both prior to, and, as the surviving corporation in, the merger) will have only one class of capital stock. This is also usually the case in the reverse subsidiary merger discussed below.

[21] Usually on a one-to-one basis.

[22] N.Y. Bus. Corp. L. § 913. See also, e.g.:

Maryland: Md. Corps. & Ass'ns Code §§ 3-105, 1-101(r-1).

Pennsylvania: 15 Pa. Cons. Stat. Ann. § 1931.

See also, Rev. Model Bus. Corp. Act § 11.02 (1991).

of the outstanding shares of the target company, T, are exchanged for cash, stock or securities of the acquiror, P, or any other consideration, and P acquires all of the outstanding shares of T formerly owned by its shareholders. It is essentially a stock purchase which, upon receipt of the requisite board and shareholder approval, is binding upon all shareholders of T. The resulting structure is similar to a reverse subsidiary merger of T with a subsidiary of P;[23] however, a binding share exchange has the advantage of not constituting a "merger" for purposes of outstanding contractual provisions which prohibit T from being a party to a merger.[24]

[6]—Short-Form Mergers

An important special case of the merger of T into P is the situation where T is entirely, or almost entirely, owned by P. The primary effect of such a transaction is to eliminate the interest of the remaining minority shareholders in T by converting their stock into cash, securities of P or securities (other than common stock) of T. In order to effect this transaction, the state corporate statutes that provide for mergers generally may require, among other things, the approval of the board and shareholders of T, the board of P and, in certain circumstances, depending upon applicable state law, the shareholders of P.[25]

In order to streamline the procedures applicable to those transactions where there is no or only a small minority interest in T not owned by P, states have adopted so called "short-form" merger statutes. These provisions generally allow mergers to be accomplished between parents and subsidiaries without the approval of the board of directors[26] or a vote by shareholders of the subsidiary being acquired, thereby greatly simplifying and shortening the merger process, if:

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[23] Indeed, the New York statute provides that a binding share exchange has the same effect as merger insofar as convertible securities are concerned. See N.Y. Bus. Corp. L. § 913(i)(2). Query whether this is intended to be a merger in which the subject company is the survivor. *Cf.*, N.Y. Bus. Corp. L. § 913(i)(3).

[24] See § 2.08[2] *infra*. There is a question, of course, as to whether a third party to such a contract will be able to convince a court that it should interpret such language to cover binding share exchanges, as well as mergers.

[25] See § 2.03[2] *infra*. There are disclosure requirements applicable to short-form mergers, at least for companies incorporated in Delaware, whether or not the target is publicly held. See Erickson v. Centennial Beauregard Cellular L.L.C., 2003 WL 1878583 (Del. Ch. 2003). See generally, § 16.02[5] N.89.1 *infra*.

[26] California does require subsidiary board approval unless it was wholly owned. Cal. Corp. Code § 1110(b).